Supreme Court, U.S.
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No. 97-1458

IN THE
Supreme Court of the United States
October Term, 1997

EASTERN NATURAL GAS CORP.,
and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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HAPP

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

No. EV 94-110-C

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.
Plaintiff,

vs.

ALUMINUM COMPANY OF AMERICA,
Defendant.

AMENDED JUDGMENT

On December 2, 1996, the defendant, Aluminum Company of America, submitted to the Court **Alcoa's Acceptance of Remittitur**. As a result, judgment against the plaintiffs, Eastern Natural Gas Corp. and Dest Exploration, Inc., is now **AMENDED**.

Final Judgment is now entered in favor of Aluminum Company of America, and against Eastern Natural Gas Corp. and Dest Exploration, Inc., on the fraud counter-claim in the amount of $397,339.

Dated: December 11, 1996

/s/_____
Gene E. Brooks,
District Judge
U.S. District Court
Southern District of Indiana

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 94-110-C

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA
Defendant.

ORDER

The Court, being duly advised, now DENIES Plaintiffs Motion for Judgment as a Matter of Law and for a New Trial on the Breach of Contract Claim. The Court further DENIES Plaintiffs' Motion for a Judgment as a Matter of Law on the Fraud Counterclaim. The Court GRANTS in part and DENIES in part the Plaintiffs Motion for New Trial on the Fraud Counterclaim: The Court GRANTS a new trial on the issue of damages, unless Alcoa is willing to accept a remittitur which reduces the total damages to $397,338, and DENIES the motion for new trial on all other issues. Finally, this Court ORDERS a Stay on enforcement of the judgment against ENG pending appeal conditioned upon the posting of

a full supersedeas bond.

So entered this 14th of November, 1996.

/s/_____
Gene E. Brooks, District Judge
U.S. District Court
Southern District of Indiana

cc: Counsel of Record

APPENDIX F

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA,
Defendant.

Ruling on Post-Trial Motions

I. Introduction

After a trial by jury, the jury returned a verdict in favor of Alcoa on the plaintiffs' breach of contract claim and a verdict in favor of Alcoa for $450,000 on the fraud counter-claim.

This matter is before the Court on Plaintiffs' Motion to Stay Proceedings to Enforce Judgment on the ALCOA Counterclaim, Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, and Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Breach of Contract Claim, all filed September 13, 1996. The defendant filed Defendant's Opposition to Plaintiffs' Motions for Judgment as a Matter of Law and New Trial and Motion to Stay Proceedings to Enforce Judgment on ALCOA Counterclaim, on September 30, 1996. The plaintiffs filed Plaintiffs' Reply to Defendant's

Opposition to Plaintiffs' Post-Trial Motions on October 9, 1996.[1]

II. Standard of Review

A. Judgment as a Matter of Law

Rule 50(b) allows a movant to "renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment..." In order for a party to obtain a judgment as a matter of law subsequent to a jury verdict, a motion for judgment must have been made at the close of all evidence. Fed.R.Civ.P. 50(a), (b).

Federal Rule of Civil Procedure 50(a) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

---

[1] On October 15, 1996, defendant filed Defendant's Further Opposition to Plaintiffs' Post-Trial Motions. Thereafter, plaintiff filed Plaintiffs' Further Reply to Defendant's **Further Opposition to Post-Trial Motions** on October 28, 1996. The Court feels that this matter has been fully briefed and no additional briefing is necessary.

The standard for a Rule 50(a) motion for judgment as a matter of law mirrors that for deciding whether to grant a summary judgment motion. See *Shields Enterprises, Inc. V First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992). Judgment as a matter of law is properly entered where no reasonable juror could find for the nonmoving party with respect to a claim or defense. The Court views all evidence in the light most favorable to the non-moving party. *Panter V. Marshall Field& Co.*, 646 F.2d 271,282(7th Cir.), cert. den'd 454 U.S. 1092(1981). The non-moving party is entitled to have the credible evidence considered in its most favorable light, but the court is not required to ignore uncontradicted, unimpeached evidence supporting movant's position. *Id.*

B. New Trial

Rule 59(a) of the Federal Rules of Civil Procedure states:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of the United States....

A new trial may be granted for three reasons: (1) the verdict is against the clear weight of the evidence; (2) the damages are excessive; or (3) the trial was unfair to the moving party. *Allison V. Ticor Title Ins. Co.*, 9790 F.2d 1187, 1196 (7th Cir. 1992)(citing *Cygnar V. City of Chicago*, 865 F.2d 827, 835 (7th Cir. 1989)). In reviewing a motion for

a new trial, the Court must view the evidence in the light most favorable to the prevailing party. *Id.* The Court cannot set aside the jury's verdict if "there is a reasonable basis in the record which supports that verdict." *Id.* (citing *M.T.Bonk Co. V. Milton Bradley Co.*, 945 F.2d 1404, 1407(7th Cir. 1991)).

III. Contract Claim

A. Judgment as a Matter of Law

Rule 50(b) of the Federal Rules of Civil Procedure state:

> If, for any reason, the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal question raised by the motion. The movant may renew its request for judgment as a matter of law...

F.R.Civ.P. 50(b)(emphasis added).

At the end of the plaintiff's case in chief, the defendant made a motion under Rule 50(a) for a judgment as a matter of law. At the end of the evidence, the plaintiff made a Rule 50(a) motion for judgment as a matter of law on the Alcoa counterclaim. It appears as if the plaintiff never made a motion for judgment as a matter of law on their breach of contract claim. Thus, they cannot now renew any such motion. F.R.CIV.P. 50(b).

The Court notes that, even if the issue had been preserved, there is clearly sufficient evidence in the record from which a reasonable juror could have found in favor of the defendant on the breach of contract claim. Judgment as a matter of law is properly entered where no reasonable juror could find for the nonmoving party with respect to a claim or defense. The Court views all evidence in the light most favorable to the non-moving party. *Panter*, 646 F.2d at 282.

In order for ENG to recover on a breach of contract claim, they must establish that they performed their part of the contract. There is a multitude of evidence from which a reasonable juror could conclude that ENG did not perform its responsibilities under the contract, including the drilling requirements and minimum spending requirements. Mr. John Hemphill, Mr. Phil Fassett, and Mr. John Holsinger all testified that ENG/Dest were in default of their contractual obligations. In addition, Mr. Larry Corwin himself testified that ENG/Dest had not met the minimum drilling requirements.

Furthermore, a reasonable juror could have concluded that there was no oil and gas located on the property and thus, ENG suffered no damages. See Testimony of C.A. Robinson (no producing gas and no known fractures); Testimony of J. Michael Gatens (no proved reserves on property).

It is clear that a motion for judgment as a matter of law on the breach of contract claim must be denied.

B. New Trial

The plaintiffs claims that they are entitled to a new trial on the breach of contract claim.

1. Alcoa Misconduct/Failure to Produce Documents

The plaintiffs claim that Alcoa improperly withheld documents during the course of the trial. Under Rule 59, a new trial may be granted if the trial was unfair to the moving party. *Allison V. Ticor Title Ins. Co.*, 9790 F.2d 1187, 1196 (7th Cir. 1992)(citing *Cygnar V. City of Chicago*, 865 F.2d 827, 835 (7th Cir. 1989)). The "failure to disclose information within the scope of proper discovery requests can, in certain circumstances, constitute grounds for a new trial." *Brandt V. Vulcan, Inc.*, 30 F.3d 752, 758 (7th Cir. 1994). In order to prevail in such a situation, the plaintiffs must show "that misconduct occurred and that it prejudiced [them]." *Id.* (citing *Wiedemann V. Galian*, 722 F.2d 335, 337 (7th Cir. 1983)).

The following discussion took place outside the presence of the jury:

Mr. Cook: Your Honor, before we get done, I'd like to take up something if you don't mind.

The Court: Yes.

Mr. Cook: During the course of discovery in this case, of course, Mr. Holsinger's notes and his memos to the Alcoa people and the Alcoa's people memos to him were withheld as privileged. Your Honor, since the privilege has now been

waived, I think we're entitled to a supplemental document production, having all of those documents produced. And I suspect that Mr. Holsinger has his files here to help prepare him for the case, so it shouldn't be a difficult proposition. In any event, those documents could come down from Pittsburgh so that we can have them over the weekend and be prepared for Mr. Holsinger Monday morning.

Mr. Rohback: Your Honor, at this point I don't think he's disclosed any client confidences, but I don't see any problem with that.

The Court: Okay.

Mr. Cook: Your Honor, there was a privileged document log produced by Alcoa, so - -

The Court: I don't know anything about that. He says there's no problem with it.

Mr. Cook: Okay.

(Holsinger Direct, p.29-30.)

It clearly appears to be the case that Alcoa was required to turn over Mr. Holsinger's "notes and memos." Furthermore, Mr. Cook mentioned the "privileged document log produced by Alcoa." There appears to be an agreement to turn over all relevant documents that was previously protected by the attorney client privilege, but, as a result of the waiver of the privilege, are no longer protected.

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On Monday morning, August 19, 1996, the following discussion took place:

Mr. Cook: Your Honor, because I believe both those issues will come up with this witness, I have prepared -- attorney/client privilege issue and the use of superseded pleading as evidence in this case- -

The Court: I thought there wasn't any issue about the attorney/client privilege. I thought that was all taken care of.

Mr. Cook: Well, your Honor, we have been produced Mr. Holsinger's file, I think, but nothing else, and I think the scope of the waiver in this case was broader than that, and we are entitled to everything that has been previously included as privileged that relates to the Warrick County project, save only the work product with correspondence with outside counsel.

The Court: I have no idea at this stage what that might be or anything.

Mr. Cook: Well, we do because we got a list of those that has been produced earlier in this case, Your Honor. That issue, Your Honor, need not necessarily come up with this witness.

The Court: All right.

Mr. Cook: We'll talk to him just about the privileged material that he produced.

The Court: Okay.

Although it appears that Alcoa may have been required to turn over some additional documents, ENG is not entitled to a new trial because there is no showing of prejudice.

First, the Court cannot determine from the record whether the documents which were not produced fell within the scope of the waiver of the attorney-client privilege. This is an evidentiary issue that needed to be addressed at trial. As seen above, this issue was addressed briefly, but, the parties were able to come to an agreement and the Court did not need to make any specific ruling. The Court will not make a post-trial evidentiary ruling when the parties proceeded with the trial, seemingly with no disagreement and no objections.

Second, the plaintiffs cannot now claim they were prejudiced when they failed to make any objection at the time. The Court is unable to find any indication in the record that the plaintiffs objected to defendant's document production. In fact, it appears that the plaintiffs agreed to continue the trial without the documents. There is no indication that plaintiff ever asked for a stay in the proceedings until such documents were produced. In fact, it appears that the plaintiffs agreed that "We'll talk to him just about the privileged material that he produced.." As a result, the Court cannot find that the plaintiffs were in fact prejudiced by the defendants actions. There being no prejudice arising from the defendants alleged misconduct, this Court cannot grant a new trial.

2. The Exclusion of Prior Pleadings

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During trial, the plaintiff attempted to introduce into evidence a pleading which was later replaced by a supplemental pleading. The Court made the following ruling during trial:

> Court: There isn't any question it would be improper in my mind to allow any evidence of prior inconsistent legal theories. I think it's improper. Both these cases seem to say if there are material admissions made by a party in a prior pleading, then it goes to the cross-examination of those witnesses, any witnesses concerning any assertions of facts made in a prior pleading. But the fact that he's changed from a negligence to a fraud claim, I think is improper. Only the facts asserted in a prior claim, I'll permit you to question him about.

(Transcript, August 19, 1996, at 9-10).

"[P]leadings are generally usable against the pleader." McCormick on Evidence, Volume 2, p 148 (4th Edition, 1992). The Court believes, however, that there is a difference between pleadings which set forth facts and pleadings which set forth legal theories.

> When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence pf the facts stated. . . .

Huey V. Honeywell, Inc., 82 F.3d 327, 332 (7th Cir. 1996)(emphasis added).

The Court correctly held that portions of prior pleadings which contain admissions of fact were admissible for purposes of impeachment.

> Upon a trial of the issues raised by the pleadings, including the amended complaint, a complaint superseded thereby might well be offered in evidence by the defense if it contains material admissions by the plaintiffs named in the amended complaint. Such evidence would be admissible in order to enable the court to determine the facts upon the issues being tried.

Contractor Utility Sales Co., Inc. V Certain-Teed Products Corporation, 638 F.2d 1061, 1084, ftnt. 30)(citing *Nisbet V. Van Tuyl*, 224 F.2d 66 (7th Cir. 1955))(emphasis added)

Although the Court did not admit into evidence the prior pleadings, the Court did allow the plaintiffs to question witnesses concerning the facts admitted in those pleadings. Thus, the Court properly allowed the plaintiffs to inquire into the facts admitted in the prior pleadings without inquiring into the thought process of changing legal theories.

This ruling was proper under Rule 403 of the Federal Rules of Evidence. Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Fed. R. Evid. 403. The Court

determined that the evidence has a strong possibility of unfair prejudice. Particularly if it intrudes on the thought process of ALCOA while preparing for the litigation. Allowing a party to inquire into such evidence would negatively impact a party's ability to prepare for litigation. Furthermore, there was great risk of confusing the jury on the actual issues which were being litigated.[2]

3. Prejudice Created by Alcoa Counterclaim

On August 1, 1996, the Court issued an Order Granting Motion to Amend Counter-Claim. This order was issued approximately two weeks before the start of trial. The plaintiffs claim that they were prejudiced by the fact that they were unable to conduct any substantial discovery. (Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, at 17).

The Federal Rules require leave of court to amend subsequent to a responsive pleading but such leave "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a); *Helm V. Resolution Trust Corp.*, 84 F.3d 874, 879 (7th Cir. 1996). The Court has determined that justice required the amendment, even at such a late date. As the Court noted in its previous ruling:

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[2] The plaintiffs also argues that the Court improperly excluded interrogatory answers. It appears to the Court that the interrogatory answers relate to the superseded pleadings. Thus, the legal analysis under Rule 403 of the Federal Rules of Evidence is similar.

> Obviously, ENG argues that it will be prejudiced by the amendment. ENG anticipates additional discovery and additional briefing. The Court will not deny ENG that opportunity, but more importantly the Court will not deny ALCOA its counter-claim just because it was uncovered at this late date.

The Court now reaffirms its prior holding. The Court believes that an amendment at such a late date was required in the interest of justice. As the Court stated, we "will not deny ALCOA its counter-claim just because it was uncovered at this late date."

Furthermore, the plaintiffs clearly had knowledge that a fraud had been committed, long before the amendment of the counterclaim. Mr. Corwin freely admitted that he committed a fraudulent act. Thus, ENG could have anticipated that such information would be revealed and would possibly lead to an amendment of the counterclaim. The fact that Alcoa did not discover this information until the "eve-of-trial" is no reason to deny them the right to assert the claim. The Court finds that ENG was not greatly prejudiced by the amendment in light of the fact that they had knowledge of the fraud and could have anticipated such action.

4. Error with Respect to Decision on August 20 Letter Agreement

The plaintiffs argued that the Court erred in a previous summary judgment ruling. The Court issued an Order on March 15, 1996 in which it ruled on the parties' summary judgment motions. The Court now reaffirms its prior holding.

For the reasons stated in the March 15, 1996 Order, this Court rules that the 1991 Letter Agreement was not a valid and enforceable contract under the laws of the State of Indiana.

5. The Jury Verdict was Against the Clear Weight of the Evidence

The plaintiffs argue that the jury verdict was against the clear weight of the evidence. As discussed briefly in Section 111(A), there is clearly sufficient evidence from which a reasonable juror could find in favor of the defendant. As a result, plaintiffs are not entitled to a new trial.

IV. Fraud Claim

A. Judgment as a Matter of Law

Under Indiana law, the elements for a claim of fraud are as follows:

(1) a material misrepresentation of past or existing fact
(2) which was untrue
(3) was made with knowledge of or in reckless ignorance of its falsity
(4) was made with the intent to deceive
(5) was rightfully relied upon by the complaining party, and
(6) which proximately caused the injury or damage complained of.

Jordan Demolition Corp. V. Jackson, 657 N.E.2d 450, 452

(Ind. App. 1995). The plaintiffs claim that the defendant failed to establish reliance or damages. (Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, at 3).

1. Reliance

Viewing the evidence in a light most favorable to the non-moving party, the Court finds that there is clearly evidence from which a reasonable juror could determine that the ALCOA relied on the fraudulent acts of the plaintiffs.

It is uncontested that the plaintiffs submitted a forged GeoData invoice to the defendant. Viewing the evidence in a light most favorable to the non-moving party, a reasonable juror could have concluded that Alcoa relied on this forged invoice.

Mr. VanWert testified:

Q: And the purpose of your inspection or your examination was to look at what?
A: It was to review to see if they had met their spending requirements for the first period.
Q: In your memo to Mr. Hemphill, you state that your examination amounted to pulling invoices and check stubs for major expenditures that would support the summary. Was that your practice when you went to ENG?
A: Yes, it was.
. . . . .
Q: --on your copy? Who made those check marks, Mr.

VanWert?
A: I did.
Q: What was the purpose of making those check marks?
A: Just indicated the ones that I had checked, either the invoice or voucher stub.

. . . . .

Q: You have a check mark next to the entry for GeoData Corporation, don't you?
A: Yes.

. . . . .

Q: And did you rely on the invoices and checks that you saw as being accurate and truthful?
A: Yes, I did.
Q: Did you have any reason to believe as you looked at these invoices and check stubs that there were forgeries involved?
A: No, I did not.
Q: And did you rely on them?
A: Yes, I did.

(VanWert direct, 63-63, 68)(emphasis added).

Viewing the evidence in a light most favorable to the non-moving party, a reasonable juror could have concluded that Alcoa relied on the false GeoData invoice when determining whether the minimum spending requirement had been met. Judgment as a matter of law is properly entered only where no reasonable juror could find for the nonmoving party with respect to a claim. Clearly, a reasonable juror could find that Alcoa relied on the fraudulent GeoData invoice.

Furthermore, the vendor analysis forms examined by Mr. Van Wert also contained an entry for a payment to Eastern Reservoir Services at the end of 1988. The evidence, viewed in the light most favorable to the non-moving party, indicates that the money paid to Eastern Reservoir Services was refunded to ENG in the beginning of 1989. (Corwin Cross at 20). A reasonable juror could have concluded that this was a material misrepresentation of fact committed with the intent to deceive Alcoa. Mr. Van Wert testified:

Q: In your review in January 27, 1989, would you have not counted that if you were to find out that Eastern Natural Gas had refunded approximately 90,000 of that 100,000 at the beginning of 1989?

A: I would doubt it. I would certainly need to know more information about it, but that would not seem right.

Q: Did anyone at ENG ever tell you that they had paid back approximately $90,000 of that $100,000 payment?

A: No, they did not.

Q: Is that something you would have wanted to know?

A: I certainly would.

Q: And did you rely on this vendor analysis form to be accurate and truthful in conducting your examination?

A: Yes. I had no reason to believe otherwise.

. . . . .

Q: On this vendor invoice, if you turn to page two, you'll notice there's still an entry there for Eastern Reservoir Services. Do you see that?

A: Yes, I do.

Q: And that still shows that totally payment have been made to Eastern Reservoir Services of a hundred

thousand dollars, doesn't it?

A: Yes, it does.

Q: If ENG had refunded approximately a hundred thousand of that at the beginning of 1989, would you expect that would have been shown on this vendor analysis someplace?

A: If it was a refund of that money for some reason such as an overpayment or whatever, yes.

Q: Did they ever tell you that they were going to, in quotes, prepay Eastern Reservoir Services a hundred thousand dollars?

A: Not that I recall, no.

Q: Would you consider it simply a prepayment if they paid Eastern Reservoir Services a hundred thousand dollars on December 28, 1988, and got it back at the beginning of the year?

A: No, I don't think I would.

Q: And did you rely on the documentation provided to you by Eastern Natural Gas and Dest in reviewing the payments that were made in the second six-month period?

A: Yes.

(VanWert direct at 67, 69-70)(emphasis added).

The testimony of Mr. VanWert clearly provides evidence from which a reasonable juror could have concluded that the alleged payment to Eastern Reservoir Services was a fraudulent misrepresentation relied on by Alcoa. There is clearly evidence in the record to support this finding. Thus, the motion for judgment as a matter of law must be denied.

2. Damage

Judgment as a matter of law is properly entered where no reasonable juror could find for the nonmoving party with respect to a claim or defense. The Court views all evidence in the light most favorable to the non-moving party. *Panter* 646 F.2d at 282. There appears to be two separate allegations of damages: (1) But for the fraudulent acts of the plaintiffs, ENG would have terminated the entire agreement and not incurred any additional costs; and (2) But for the fraudulent acts of the plaintiffs, Alcoa would have found a different operator for the project which needed less administrative overview. Viewing the evidence in a light most favorable to the non-moving party - Alcoa - it is clear that a reasonable juror could have found that damages occurred as a proximate result of the fraud under either damage theory.

Mr. Hemphill testified that ALCOA would have or might have terminated the project if it had not been for the fraudulent acts of the plaintiffs:

Q: All right. Mr. Hemphill, how was Alcoa damaged -- from your perspective as the person administering the Peabody lease and the agreement to sublease, how was Alcoa damaged by the GeoData invoice that has been such an issue in this case?

A: The question is about the GeoData invoice?

Court: Yes

A: The GeoData invoice, as I understand it, identified spending that we believe to be true which helped satisfy the initial period of the lease spending requirement, and had it not been true or had it not

been submitted in a false way, it would have not been satisfied.

Q: And so how were you damaged?

A: We were deceived by ENG into believing that they were performing as they were supposed to.

Q: How did that cost you any money?

A: We continued to work with ENG believing that they were a good operator and truthful in their business relationships.

Q: And how did that damage you?

A: We continued working with ENG for a great, long time, as many as six or eight years, and we dedicated a lot of manpower and resources to working with him in that project. We would have not done that if we would have known that he was a fraud.

. . . . .

Q: So the essence of the damage claim is that you would have terminated the entire project or might have terminated the entire project in 1988?

A: That's correct.

(Hemphill Direct at 109-110, 112).

Additionally, Mr. Holsinger testified that he would have terminated the agreement had he been aware of the fraud:

Q: Mr. Holsinger, if you had found out in 1988 that ENG had lied to Alcoa and had submitted forged invoices to Alcoa, is there any question in your mind that you would have terminated the agreement?

A: No.

Q: And it's one thing if they didn't meet the minimum spending requirement, maybe they could have cured it, but if you found out that they lied to you and they had submitted forged documents to you, is there anything that you think they could have done to cure that type of a deception?

A: No.

Q: If you learned in 1988 or 1989 that Eastern Natural Gas and Larry Corwin were lying and forging, would you have terminated the relationship?

A: Absolutely.

(Holsinger Vol.2, at 88-89).

Mr. Hemphill further testified:

Q: How did that [the fraud] cost you any money?

A: We continued to work with ENG believing that they were a good operator and truthful in their business relationships.

Q: And how did that damage you?

A: We continued working with ENG for a great, long time, as many as six or eight years, and we dedicated a lot of manpower and resources to working with him in that project. We would not have done that if we would have known that he was a fraud.

(Hemphill, at 110).

A reasonable juror could have inferred that Alcoa would have terminated the entire project because of ENG's failure to comply with the spending requirements. The Court

must view all evidence and any reasonable inference therefrom in a light most favorable to the non-moving party - Alcoa. Thus, there is evidence in the record to support a finding of damages.

The plaintiff correctly argues that there is some evidence in the record that Alcoa may have brought another operator onto the land rather that terminating the entire project. Mr. Hemphill stated:

Q: You wouldn't have spent management time trying to develop the property with someone else?
A: We may have.
Q: So if you would have gotten someone else on the property, how were you damaged? In other words, you would have spent the management time anyway, wouldn't you?
A: I don't know.

(Hemphill at 110-112)

Assuming that Alcoa would have brought in a different contractor, there is still evidence that they suffered damages. There is evidence in the record from which a reasonable juror could have concluded that, but for the fraudulent acts of the plaintiffs, Alcoa would have hired a different operator with less administrative costs.

Mr. Holsinger testified:

Q: And in order to prevail on your counterclaim, you have to prove, as I understand it, that if you

terminated ENG, you wouldn't have put anybody else on the property. Is that the substance of your counterclaim?

A: I don't believe that part I'd agree with you. I think we were alleging that we incurred additional costs that we would not have incurred if we brought someone else on the property who didn't requires as must attention from Fassett/Hemphill/Holsinger and other people that we brought in related to this case.

Mr. Van Wert further testified:

Q: Mr. Van Wert, when Mr. Hemphill told you that he was spending or spent 40 percent of his time in 1989 on this project and you put it into the damage calculation that's 545, was the theory that Mr. Hemphill would not have spent 40 percent of his time on the Warwick County project if you had known about the GeoData invoice?

A: That would be the theory, yes.

Q: Okay. How did it-- what do you think? Would this project have gone away in 1989, and would Alcoa have abandoned its interest in the property in 1989 if you'd known about the GeoData invoice?

A: Well, certainly I think it's questionable whether or not we would have continued with this company.

(Van Wert, at 91-92).

The record is full of evidence concerning the special attention which Alcoa gave to ENG concerning the project. A reasonable juror could have concluded, that but for the

fraudulent acts of the plaintiffs, Alcoa would have terminated the relationship with ENG and brought in another company who needed little, if any, supervision. Thus, it is clear that a reasonable juror could have determined that Alcoa suffered damages which where the proximate result of the fraudulent acts of the plaintiffs. For this reason, judgment as a matter of law is inappropriate.

B. New Trial

The plaintiffs argue that a new trial on the counterclaim should be granted because:

(1) The Weight of the Evidence
(2) The Damages Awarded Were Excessive
(3) ENG was Improperly Prejudiced by the Eve-of-Trial Grant of the Alcoa Motion to Amend; and
(4) The Failure to Distinguish between ENG and Dest in the Jury Instructions.

1. Weight of Evidence

The plaintiffs argue that (1) the jury's verdict was against the clear weight of the evidence on the basic elements of the fraud claim, and (2) the jury's verdict was against the clear weight of evidence with respect to the running of the statute of limitations. As the Court discussed in Part IV(A), there is evidence from which a reasonable juror could conclude that the elements of the fraud claim have been satisfied. The jury's finding is clearly supported by the evidence.

The plaintiffs further argue that the jury's verdict was against the clear weight of the evidence presented with respect to the running of the statute of limitations. The Court gave the jury, at the request of the plaintiffs, the following instruction:

> There is an issue in this case arising from a defense asserted by ENG based upon what is called the statute of limitations. This is simply a provision of the law requiring Alcoa to commence their counter-claim for fraud within a prescribed period of time.
>
> In a case like this one the time limit place upon Alcoa began to run when Alcoa first knew, or by the exercise of reasonable care should have known, that ENG committed fraud.
>
> In this instance the applicable limitation period is six years. The alleged fraud occurred in late 1988 and mid-1989. ENG claims that Alcoa should have known, through the exercise of reasonable care, of the alleged fraud by the end of 1989. Alcoa claims that through the exercise of reasonable care they first discovered the alleged fraud in May, 1996 during Larry Corwin's deposition.
>
> As to this issue, you are instructed that ENG has the burden of proof by a preponderance of the evidence.
>
> If it appears from a preponderance of the evidence in the case that Alcoa had information by the end of 1989 which would normally have led a reasonably careful person of the same age, mental capacity, intelligence, training and experience to make inquire through which he would surely learn certain

> facts, then Alcoa may be found to have had knowledge of those facts the same as if he had made such inquiry and had actually learned such facts.
>
> If you find that Alcoa failed to meet the requirements of the statute of limitations, you must find in favor of ENG on Alcoa's counter claim for fraud.

From the jury verdict, it appears that the jury determined, as a factual matter, that the defendant, in the exercise of reasonable care, could not have discovered the fraud at an earlier time. There is clearly evidence in the record from which a reasonable juror could conclude that Alcoa could not of discovered the fraud until after 1989. Alcoa presented evidence that they did not learn of the fraud until after the litigation was commenced. (VanWert Cross, at 93-94) Furthermore, the evidence supports an inference that Alcoa could not have known, through ordinary diligence, of the fraud. There is ample evidence throughout the transcript that ENG committed fraud and that the fraud was effectively concealed. There is no evidence that Alcoa suspected the fraud or had any reason not to trust Larry Corwin. Thus, there is substantial evidence to support the jury's conclusion that Alcoa could not have discovered the fraud prior to the running of the statute of limitations.

2. Damages Award

The trial judge may set aside the jury's verdict only if it is "'monstrously excessive' or there is 'no rational connection between the evidence on damages and the verdict.'." *Joan W. V. City of Chicago*, 771 F.2d 1020 (7th

Cir. 1985)(citing *Abernathy V. Superior Hardwoods, Inc.*, 704 F.2d 963, 971(7th Cir. 1983)). "Reconstructing a jury's thinking from a general verdict is often difficult and fruitless... "*Abernathy*, 704 F.2d at 972.

On the defendants counterclaim, the jury awarded a verdict in the amount of $450,000. The plaintiff claims that the "stipulated amount of the damages claims by Alcoa was only $411,000 and this included the value of all the management time and all the fees incurred on the Warwick Count (sic) project by Alcoa after 1988. (Plaintiffs' Motion for Judgment as a Matter of Law and For a new Trial on Defendant's Fraud Counterclaim, at 16).

It is clear to this Court that the jury award of $450,000 was not "monstrously excessive" compared to the plaintiffs' claim that the defendant suffered, at most, $411,000. The difference of $38,000 is not outrageously excessive. However, this Court must determine whether there is a rational connection between the damage award and the evidence.

It must be noted that in the current situation, the jury chose to award $450,00 in compensatory damages and no punitive damages.

During trial, outside the presence of the jury, the following discussion took place:

Mr. Cook: I will do that without reference to answers to interrogatories or pleadings in the case, but I will want to some how get across to the jury

our agreement that the damages asserted in the counterclaim are this. Can we stipulate to that?

Mr. Rohbach: Right.

The Court: Okay. No problem.

Mr. Cook: Now let me see if I can find our stipulation.

The Court: It's not a very difficult stipulation, is it?

Mr. Rohbach: I've got $397,338 plus $14,715--

The Court: Attorney fees.

Mr. Rohbach: -- attorney's fees. Whatever that number is, that's what our damage number is. As I said, we're also asking for punitive in this case, but that not a number that's calculable.

Mr. Cook: What's the consultant?

Mr. Rohbach: The consultant is $14,187. That's a breakdown of the components of the damages.

Mr. Cook: Do you want to read the stipulation to the jury?

Mr. Rohbach: No.

Mr. Cook: I can tell them that.

Mr. Rohbach: You don't even have to present it as a stipulation. You can simply state, if you want, that defendant's damages in their counterclaim amount to whatever that number is, 400,000-something dollars.

The Court: I think it's better if you both agree. The jury can write it down if they want to.

Mr. Cook: Burley has a good point. My stipulation is going to be that's the claim; that's not what the damages are.

Mr. Rohbach: That's right.

Mr. Cook: Well, Your Honor, I think we have resolved that.

The Court: All right.

(Hemphill direct, p.107-108, 109). Although the parties stipulated to these amounts outside the presence of the jury, there is no indication in the record that this stipulation was in fact read to the jury.

Furthermore, a review of the evidence clearly shows that there is no "rational connection" between the actual damage and the jury award of $450,000. Alcoa offered proof of damages by introducing an exhibit showing the total management time expended by Alcoa to be $383,151. Furthermore, the exhibit indicated that the total consultant fees were $14, 187. Thus, the total amount of damages entered into evidence was $397,338.

There is no evidence in the record to support a jury verdict in excess of $397,338. There is no calculation of attorney fees in evidence.[3] In fact, the exhibit introduced into evidence left the amount of attorney fees blank. There is no evidence that Alcoa would have invested the money over time if it was available to them.[4] The record is devoid of any evidence to support a jury verdict above the amount of $397,338. Any award above this amount would be based on

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[3] The defendant claims they are entitled to attorney fees. However, they introduced no evidence of the number of hours or billing rate for the attorney. Thus, any monetary figure would be mere speculation.

[4] Even if Alcoa was entitled to recover the "time value" of money, this appears to be a request for pre-judgment interest. Under Indiana Code 34-4-37-9, it is the Court, not the jury, which awards pre-judgment interest.

nothing more than mere speculation. Therefore, this Court remands this case for a new trial on the issue of damages unless Alcoa is willing to accept a remittitur which reduces the total damages to $397,338.

3. Motion to Amend Counterclaim

On August 1, 1996, the Court issued an **Order Granting Motion to Amend Counter-Claim**. This order was issued almost two weeks before the start of trial. The plaintiffs claim that they were prejudiced by the fact that they were unable to conduct any substantial discovery. (Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, at 17).

The Federal Rules require leave of court to amend subsequent to a responsive pleading but such leave "shall be freely-given when justice so requires." Fed.R.Civ.P. 15(a); Helm v. Resolution Trust Corp., 84 F.3d 874, 879 (7th Cir. 1996). The Court has determined that justice required the amendment, even at such a late date. As the Court noted in its previous ruling:

> Obviously, ENG argues that it will be prejudiced by the amendment. ENG anticipates additional discovery and additional briefing. The Court will not deny ENG that opportunity, but more importantly the Court will not deny ALCOA its counter-claim just because it was uncovered at this late date.

The plaintiffs clearly had knowledge that a fraud had been committed, long before the amendment of the

counterclaim. In fact, Mr. Corwin freely admitted that he committed a fraudulent act. Thus, ENG could have anticipated that such information would be revealed and would possibly lead to an amendment of the counterclaim. The fact that Alcoa did not discover this information until the "eve-of-trial" is no reason to deny them the right to assert the claim. The Court finds that ENG was not greatly prejudiced by the amendment in light of the fact that they had knowledge of the fraud and could have anticipated such action.

In order to promote justice and judicial economy, the Court finds that it was proper to allow defendant to amend their counterclaim.

4. Jury Verdict

Under Indiana law, "joint tort-feasors" are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing single injury. See *United Farm Bureau Mutual Insurance Co., V. Blossom Chevrolet*, 668 N.E.2d 1289 (Ind. App. 1996). The evidence in the current situation clearly shows that the plaintiffs were acting together in committing the wrong.

Mr. Larry Corwin testified, on cross-examination, that:

Q: Did you prepare a check for GeoData to support this $81,000? Did you actually go so far as to write them a check?
A: Yes, we did.
Q: Did you actually send them a check?

A: No.
Q: Did you have a canceled check, though, that showed it had been deposited available?
A: Yes.
Q: Who deposited it?
A: One of my folks.
. . . . .
Q: And that's a check made out to GeoData for $81,400?
A: Yes, it is.
Q: And the back of it shows an endorsement, and can you read that endorsement?
A: Yes, I can.
Q: And who's it deposited for?
A: It's deposited into Dest Exploration, Inc.'s account.
Q: You have the word "GeoData" up there, don't you?
A: Yes.
Q: So you then deposited this check for GeoData in a Dest account?
A: Yes.

The fraudulent check written by ENG was actually deposited in Dest's bank account. The fact that the check used in committing a fraudulent act was deposited in Dest's back account is some evidence which shows that Dest was actively involved in perpetrating the fraud. There was joint action between tortfeasors which created one wrong. Under Indiana law, it is proper to hold such joint tortfeasors jointly and severally liable.

Thus, there was no error in submitting a joint verdict form to the jury and receiving one against the plaintiffs collectively.

IV. Stay Proceedings

Pursuant to Rule 62(d)of the Federal Rules of Civil Procedure, this Court ORDERS a Stay on enforcement of the judgment against ENG pending appeal conditioned upon the posting of a full supersedeas bond. See *Endress & Hauser, Inc. V Hawk Measurement Systems Pty. Ltd.*, 932 F.Supp. 1147 (S.D. Ind. 1996).

V. Conclusion

The Court, being duly advised, now DENIES Plaintiffs Motion for Judgment as a Matter of Law and for a New Trial on the Breach of Contract Claim. The Court further DENIES Plaintiffs' Motion for a Judgment as a Matter of Law on the Fraud Counterclaim. The Court GRANTS in part and DENIES in part the Plaintiff's Motion for New Trial on the Fraud Counterclaim: The Court GRANTS a new trial on the issue of damages, unless Alcoa is willing to accept a remittitur which reduces the total damages to $383,151, and DENIES a new trial on all other issues. Finally, this Court ORDERS a stay on enforcement of the judgment against ENG, pending appeal, conditioned upon the posting of a full supersedeas bond.

Eastern Natural Gas Corp. and Dest Exploration, Inc. v. Aluminum Company of America - No. EV 94-110-C

So entered this 14th day of November, 1996.

/s/_____
Gene E. Brooks, District Judge
U.S. District Court
Southern District of Indiana

cc: Counsel of Record

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 94-110-C-R/H

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA
Defendant.

AMENDED JUDGMENT

This cause, having come on for trial before the Court and the jury, and the issues having been duly tried, and the jury having returned its verdict, which verdict finds for the defendant and reads as follows:

{H. I.}

IT IS SO ORDERED that the plaintiffs take nothing by way of their complaint; and,

IT IS FURTHER ORDERED that the defendant recover from the plaintiffs on the counterclaim in the amount

of Four Hundred Fifty Thousand Dollars and zero cents ($450,000.00).

Dated: September 3, 1996

/s/_____
GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT

Copies: All counsel of record

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 94-110-C-R/H

EASTERN NATURAL GAS CORP.
Plaintiff,

VS.

ALUMINUM COMPANY OF AMERICA
Defendant.

JUDGMENT

This cause having come on for trial before the Court and the jury and the issues having been duly tried and the jury having returned its verdict which verdict finds for the defendant and reads as follows:

[H.I.]

IT IS ORDERED that the plaintiff take nothing by way of their complaint and

IT IS FURTHER ORDERED that the defendant recover from the plaintiff on the counterclaim in the amount of Four Hundred and Fifty Thousand Dollars and zero cents ($450,000.00).

Dated: August 29, 1996

/s/_____
GENE E. BROOKS, JUDGE
UNITED STATES
DISTRICT COURT

Copies: All counsel of record